



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL CASE NO. 10F 2013

(An application for bond pending appeal)

REPUBLIC PROSECUTOR

VERSUS

BONFACE SHIKHOLI ACCUSED

RULING

The accused person is charged with murder. He was brought to court on 12th February, 2013 and pleaded not guilty. He has now applied for bail pending trial through an application dated 22nd February 2012 (which should be 2013).

The application brought by way of Notice of Motion was filed under Section 357 of the Criminal Procedure Code (Cap 75). It has grounds on its face, which are that –

- a. the offence is bailable;
- b. the applicant is ready and willing to provide a tangible security if admitted to bail;
- c. the applicant will observe the terms and conditions of bail and is willing and ready to abide by such terms as this court will deem fair and just;
- d. it will be fair and just if the applicant is released on bail based on the circumstances and reasons set forth in his supporting affidavit.

The application was filed with a supporting affidavit sworn by the applicant. It was deponed therein *inter alia* that it would take time before the case was heard and finally determined; that the applicant had no reason to abscond as he had a fixed abode; that he was willing to honour the bail terms that might be imposed by the court; and that it would be fair and just to grant him bail.

On the hearing day, Mr. Onsando who held brief for Mr. Kiveu for the applicant, submitted that the applicant was willing to provide reliable sureties, if released on bail. That he would also abide by conditions that might be imposed by the court. Counsel further submitted that he had perused witness statements and was of the view that this was a fit case for the grant of bail.

The learned State Counsel Mr. Oroni, submitted that the prosecution did not have any compelling reasons why the applicant should not be released on bond. As a consequence, they did not file a written response to the application. He left the application to the discretion of the court.

Bail is a Constitutional right, regardless of the offence charged. Article 49 of the Constitution of Kenya 2010 expanded the right to bail, to cover capital offences. The Article also provides for situations or

offences where a person should not be remanded in custody at all. The relevant parts of the Article are as follows –

49 (1) An arrested person has a right –

(g) at the first court appearance to be charged or

informed of the reason for the detention

continuing.

(h) to be released on bond or bail, on reasonable

conditions, pending a charge or trial, unless there are compelling reasons not to be released.

(2) A person shall not be remanded in custody for an

offence if the offence is punishable by a fine only

or imprisonment for not more than six months.

From the above Constitutional provisions, a person against whom an offence punishable by a fine only or imprisonment for not more than six months is alleged, should not be remanded in custody at all. He or she has to be released on bond or bail.

As for a person suspected of committing all other offences, including capital offences, he or she can be denied bail only where there are compelling reasons not to be so released on bond.

The grant of bail by the trial court pending the hearing of a case, has been the subject of consideration in several cases. The grant of such bail has always been the discretion of the trial court, taking into account the Constitutional and legal provisions applicable. The general principles to guide a court in the exercise of that discretion were captured in the case of **Nyanga –vs- Republic [1985] KLR 451**, at page 455 where *Chesoni, J.* as he then was, stated –

“The primary purpose of bail is to secure the accused person’s attendance at court to answer the charge at the specified time. I would, therefore agree with Mr. Karanja that the primary consideration before deciding whether or not to grant bail is whether the accused is likely to attend trial. In considering whether or not the accused will attend his trial the following matters must be considered:

- a. ***The nature of the charge or offence and the seriousness of the punishment to be awarded if the applicant is found guilty. Where the charge against the accused is more serious and punishment heavy, there are more probabilities and incentive to abscond, whereas in case of minor offences there may be no such incentive.***
- b. ***The strength of the prosecution case. The court should not be willing to remand the accused in custody where the evidence against him is tenuous, even if the charge is serious. On the other hand, where the evidence against the accused is strong, it may be justified to remand him in custody.***
- c. ***The character and antecedents of the accused. Where the court has knowledge of the accused person’s previous behaviour these may be considered, but by themselves they do not form the basis for refusing bail, although coupled with other factors may justify a refusal of bail.***
- d. ***Accused’s failure to surrender to bail, on previous occasion will by itself be a good ground for refusing bail.***
- e. ***Interference with prosecution witnesses. Where there is a likelihood of the accused interfering with prosecution witnesses if he is released on bail, bail may be refused, but there must be***

strong evidence of the likelihood which is not rebutted and it must be such that the court cannot impose conditions to the bail to prevent such interference.

The learned State Counsel has not raised any of the above issues before this court. He has responded to the new Constitutional provisions by stating that the prosecution does not have any compelling reasons to oppose bail. He has left the decision in the present application to the discretion of the court.

Though the burden is on the prosecution to persuade the court on the compelling reasons why an accused person should not be released on bail, the court cannot be blind to factors that have come to its attention otherwise, especially in murder cases where the safety of the accused, if released on bond would be at stake, if he has to go and live in the same community where he is alleged to have killed someone. An allegation that a person has killed another in the community is an emotive issue, especially if witnesses for the prosecution have testified in court as yet. In considering an application for bail in capital offences therefore, the court is duty bound to protect the life of the accused even while enforcing the right to liberty, before exercising its discretion to grant of bail.

In the present case, I have neither seen copies of prosecution witness statements, nor have I been told where the accused will live if granted bail. I only know that the accused is alleged to have killed somebody, and that no prosecution witness has testified as yet. Since the presumption is that he is innocent until proven guilty, and since no compelling reasons has been alleged or come to the attention of the court to justify the denial of bail, in effect his application has merits. I will allow the same to guarantee and give effect to his Constitutional right to freedom.

Consequently, I allow the application and order as follows:-

1. The accused will be released on his signing a bond of Kshs.500,000/= (Kshs. Five hundred thousand only) with one surety of similar amount.
2. He will not interfere with witnesses.
3. He will attend all mentions and the hearing of the case.

Dated at Kakamega this 30th day of July, 2013

George Dulu

J U D G E